

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-216573

DATE: February 11, 1965

MATTER OF: Benjamin C. Hail

DIGEST:

A civilian employee was separated for voluntary retirement but was later restored because he refused to waive retired military pay to qualify for a civil service annuity. The separation was not an unjustified or unwarranted personnel action entitling him to backpay since the personnel office stated that he was informed prior to separation that he had to waive his military retired pay to qualify for optional retirement. Although he contends he was not so advised he should have known there was a question about the matter. Further, the agency position must be accepted when there is an irreconcilable difference between the claimant and the agency.

A civilian employee of the Defense Logistics Agency submitted a request for voluntary retirement and was separated but refused to waive military retired pay so that his military service could be added to his civilian service for civil service retirement purposes. He was denied immediate retirement by the Office of Personnel Management because, without the military service, he had insufficient years service to qualify for an annuity at his age. We are asked whether he is entitled to backpay from the time he was separated until he was restored to duty on grounds that his separation was erroneous and considered an unjustified and unwarranted personnel action.^{1/} Since we must conclude that the employee was informed correctly regarding the waiver requirement and his application for retirement was processed promptly as required, the separation was proper and he is not entitled to backpay.

^{1/} Mr. W. W. Witte, Accounting and Finance Officer, Defense Contract Administration Services Region Atlanta, Defense Logistics Agency, submitted this request for a decision.

Mr. Benjamin C. Hail, a civilian employee of the Defense Logistics Agency, applied for voluntary retirement, to be effective February 29, 1980, at which time he would be over age 55 and would have 12 years, 5 months and 17 days of military service, plus 18 years, 5 months and 12 days of civilian service, for a total of 30 years, 10 months and 29 days. Under 5 U.S.C. § 8332(c), credit is not allowed for military service which serves as the basis for military retired pay unless, among other exceptions not relevant here, the retirement pay is based on a disability caused by an instrumentality of war and incurred in line of duty during a period of war. However, if an exception is not applicable, credit may be allowed for military service if military retired pay otherwise allowable is waived. 5 C.F.R. § 831.301(c).

Mr. Hail was receiving disability retired pay based on his military service at the time he submitted his application for civil service retirement and, although the facts are not entirely clear, he apparently did not intend to waive receipt of that pay because he believed that his military retirement was based upon a disability caused by an instrumentality of war and incurred in line of duty during a period of war. A communication from the Office of the Judge Advocate General, Department of the Navy, dated August 28, 1981, indicates that the Navy had determined that Mr. Hail's military retirement was not based upon disability caused by an instrumentality of war and incurred in line of duty during a time of war. Thus, credit for his military service for civil service retirement purposes, in the absence of a waiver of military retired pay, was not authorized.

Subsequently the Office of Personnel Management by letter dated October 28, 1981, informed Mr. Hail's personnel office of the disallowance of his application for retirement because he did not meet the age and service requirements for optional retirement on the date of his separation. This letter stated that in order to be eligible, he must be at least 55 years of age and have a minimum of 30 years' service.

Mr. Hail's personnel office informed the Office of Personnel Management by letter dated December 10, 1981, that he had in excess of 18 years of civilian service and 12 years of military service, that he was counseled properly regarding the criteria for optional retirement, and that they were not informed at the time application was made that he did not intend to waive military retired pay for the purpose of becoming entitled to civil service annuity. They

indicated further that the retirement application was not delayed pending receipt of an acknowledgment of waiver from Mr. Hail's retired pay center, because Federal Personnel Manual Supplement 831-1 advises agencies not to delay submission of retirement applications pending receipt of an acknowledgment of waiver since the Office of Personnel Management ensures that waiver of retired pay is in effect. Therefore, the agency does not believe that Mr. Hail's application was processed erroneously or that he is entitled to backpay since they had complied with existing regulations.

Mr. Hail was restored to the rolls on January 3, 1982, and on September 9, 1982, he claimed backpay for the period he was off the rolls, February 29, 1980, to January 3, 1982.

Backpay is governed by 5 U.S.C. § 5596 and the implementing regulations and instructions of the Office of Personnel Management in 5 C.F.R. § 550.801. These authorities provide that backpay may be awarded upon a finding, based on an administrative determination or a timely appeal, by appropriate authority, that an employee has undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or any part of the pay of the employee.

In a prior case an employee alleged that he believed that he could use his military service to establish eligibility for civil service retirement without waiving his retired military pay when he applied for optional retirement. The Office of Personnel Management denied him a retirement annuity. The agency claimed that it had counseled the employee with regard to the waiver requirement and that his application was accepted and processed only upon his assurance that he intended to make such a waiver. The record in that case, therefore, reflected a dispute between the parties with regard to a material fact. We denied the employee's claim for backpay from the date of his separation to the date he was restored after retirement was denied explaining that, in the event of a dispute, it is our long-standing practice to resolve the matter in favor of the Government. This practice results from the rule that the burden is on a claimant to establish the liability of the United States and the claimant's right to payment. 4 C.F.R. § 31.7 (1984). Charles M. Kindick, B-187891, June 3, 1977.

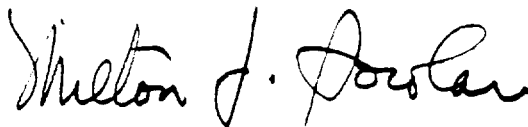
In the present situation Mr. Hail's personnel office has found that his application for retirement was not

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processed erroneously in order to make his separation an unjustified and unwarranted personnel action under the provisions of 5 U.S.C. § 5596. They base this finding on the fact that he had enough creditable service when he applied for voluntary retirement if he included his military service. His ineligibility for an immediate civil service annuity resulted solely from his refusal to waive his military pay.

Mr. Hail contended in a letter dated December 16, 1981, addressed to the Office of Personnel Management that he was not informed verbally or in writing at the time he retired that he would receive only a deferred annuity at the age of 62 if his military service was not creditable. This information is in direct conflict with the statement of his personnel office. In view of our long-standing practice the factual dispute must be resolved in favor of the Government. Charles M. Kindick, supra; Linnie V. Blevins, June 14, 1982.

Thus, we do not find that Mr. Hail's separation was erroneous or that he was subjected to an unjustified or unwarranted personnel action entitling him to backpay. Therefore, Mr. Hail's claim must be denied.


for Comptroller General
of the United States